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Post's Brief Against Enjoining Series on Vietnam

Following is the text of the brief filed by The Washington Post Co. before the U.S. Court of Appeals for the District of Columbia.

INTRODUCTION

This is a singular case. For the first time in this nation's history the Federal Government has sought to impose a prior restraint upon a publication by the press. Two Federal District Courts have now rebuffed the Government's effort to impose its will upon the press. Both courts have found that the possibilities of harm envisioned by the Government from publication cannot outweigh the First Amendment right, which is premised on the overriding right of the people to be informed. Twice the Government has been told on essentially the same facts that its claims of irreparable injury are insubstantial compared with the real injury which would result to the people from the prior restraint sought. In seeking to censor the press the Government has forgotten that in the words of Judge Gesell (Tr. 269) "the interests of the Government are inseparable from the public interest. These are one and the same and the public interest makes an insistent plea for publication." The problems and difficulties — real or imagined—which may accrue to the Government from these publications afford no warrant for their unprecedented demand to shackle the press.

FACTS

Ten days ago The New York Times began publishing a series of articles allegedly based upon papers from a document entitled "History of U.S. Decision Making Process on Vietnam Policy" covering the period of 1945-1967, which was prepared in 1967-68 at the direction of then Secretary of Defense Robert McNamara.

After the Times had published three installments in the series, the Government filed suit and obtained a temporary restraining order on June 15 prohibiting further publication of the series. On June 18 and 19, The Washington Post published two articles based on what appeared to be similar documents. This action ensued.

The Government alleges that the study consists of 47 volumes comprising approximately 7000 pages. The documents in the study range in age from 1945 to early 1968 and encompass analyses and commentary with supporting data consisting of cables, memoranda and other documents including newspaper clippings and speeches by former public officials. As stated by Judge Gesell, the documents include "material in the public domain and other material that was Top Secret when witten long ago, but not clearly shown to be such at the present time." (Tr. 267).

The documents in the possession of the Post, which are described in detail in the inventory prepared by the Post (Defendants' Exhibit 1), are substantially fewer in number (approximately 4415 pages), do not have the same pagination, and may be different in substance. (The Government has stated its belief that the documents in the possession of the Post may be from a working draft of the study.) Also, The Washington Post does not have a 1965 document entitled "Command and Control Study of the Tonkin Gulf Incident" prepared by the Defense Department's Weapon System Evaulation Group involved in the New York case.

The entire 47 volume series is classified "Top Secret-Sensitive." The classification "Top Secret" (there apparently is no "Top Secret-Sensitive") is defined by DOD as follows:

> TOP SECRET—The highest level of classification,
> TOP SECRET, shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation; such as, leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological development vital to the national defense. The use of the TOP SECRET classification shall be severely limited to information or material which requires the utmost protection. (See Part 1, Appendix A.)

There is evidence with respect to the classification process that:

1. The overall classification of the series was necessarily fixed by the highest classification of any source material on which it is based. (Tr. 16)

2. The originator of a document generally determines its classification which is not changed unless the classifier establishes conditions for automatic downgrading and declassification. (Tr. 30) Mr. M[a]cClain, a Security Classification Officer with prime responsibility for policing declassification, acknowledged that he got few requests for declassification of Top Secret documents. (Tr. 30) Similarly, Dennis J. Doolin, Deputy Assistant Secretary of Defense for East Asia and Pacific Affairs, made few recommendations that documents be declassified. (Tr. 55)

3. No attempt was made to segregate classified documents in the study from non-classified documents in order to avoid over-classification (Tr. 16-17), nor had the study in issue been reviewed for purposes of downgrading and declassification. (Tr. 56-57, Mr. Doolin, however, had been reviewing the document for some time because of requests of access thereto by Senator Fullbright, which Mr. Doolin recommended against. (Tr. 35-36)

In addition to evidence as to the classification process with respect to the study, the Government introduced evidence that there were 15 copies of the study prepared, of which two went to former Secretaries McNamara and Clifford, but none to the White House. (Lofdahl Aff. Pl. Ex. 1)

Finally, the Government submitted affidavits *in camera* by Doolin, William B. Macomber, Deputy Under Secretary for Administration of the Department of State, both of whom testified on cross-examination, and by Lt. General Melvin Zais, Director of the Operations Directorate, Joint [Chief of] Staff, and Admiral Gayler of the National Security Agency.

The appellees submitted eleven Affidavits from reporters and editors of The Washington Post which primarily attested to the following matters.

First, that there is excessive overclassification by the Government of information in the defense and foreign policy area. Illustrative of this point is paragraph 15 of the Affidavit of Murrey Marder (Ds Ex. 6),* relating to his discussions with McGeorge Bundy, then National Security Adviser to the President, in which they both concluded that at best five per cent of the highly classified documents with which Mr. Bundy regularly dealt actually warranted being treated as "secrets."

Second, that there is extensive dissemination of classified information by Government officials to the press and resulting publication of reports based thereon. The Affidavits and the stories attached thereto of Bernard D. Nossiter (Ds Ex. 9), Mar[i]lyn Berger (Ds Ex. [illegible] Bagdikian (Ds

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Ex. 7) are illustrative of this point, as are the following two examples from the Affidavits of Chalmers Roberts (Ds Ex. 3) and Benjamin Bradlee (Ds Ex. 4). At pages 3 and 4 of his Affidavit Mr. Roberts states:

> "On December 20, 1957, The Washington Post ran on page one an article I wrote (attached) with an eight column headline reading" 'Secret Report Sees U.S. in Grave Peril' and with the subhead saying: 'Enormous Arms Outlay Is Held Vital to Survival.' The first paragraph of the story read: 'The still top-secret Gaither Report portrays a United States in the gravest danger in its history.'
>
> "President Eisenhower to whom the Gaither Report had been sent, wrote in retirement in 1965 in the second volume of his memoirs, 'Waging Peace,' (p. 221): 'When my associates and I considered and discussed the report, I remarked, 'It will be interesting to find out how long it can be kept secret.' A roughly accurate account soon appeared in a local publication.' Eisenhower proceeded in his memoirs, to make public for the first time additional data from the Gaither Report. To the best of my knowledge this highly classified document to this day remains classified."

At page 4 of his Affidavit Mr. Bradlee stated:

> "For example, I was present in the office of a Congressman in 1958 or 1959 when he gave me a 'secret' State Department document about foreign aid. Before he handed the document over he took a pair of scissors from his desk and carefully removed the 'secret' label from each page. His stated purpose for giving me this document was to kill the foreign aid bill."

Third, that the extensive classified information received by the press has generally been handled in a responsible fashion. Illustrative is paragraph 5 of the Affidavit of Ben H. Bagdikian (Ds Ex. 7) where it is pointed out that The Washington Post knew that U-2 spy planes were flying over Russia some months before Gary Powers' plane was shot down but did not publish this information.

Fourth, because information in the area of national defense and foreign policy is so extensively classified, it is necessary for a free press —charged with the obligation to insure that the Government's version of events competes for public acceptance with versions developed by independent journalism—to secure independent sources of classified information in this area. This point is aptly stated in the Affidavit of Murrey Marder (Ds Ex. 6) at page 3:

> "But a free press, if it is to remain free, cannot be bound by what the government disseminates in either classified or non-classified information; it must be free to test the validity of both by exercising its own resources to obtain contradictory versions of both types of information."

This point is also strikingly illustrated in the discussion of Mr. Marder's article on American intervention in the Dominican Republic, which discussion appears at pages 2 and 3 of his Affidavit (Ds Ex. 6).

Fifth, the widespread knowledge of authorities in the field with respect to the true history of America's involvement in Vietnam, and the resulting fact that the information contained in the materials here in question appears to be largely confirmatory of material previously published. This is pointed out in the Affidavits of both Chalmers M. Roberts (Ds Ex. 3 at p. 7) and Murrey Marder (Ds Ex. 6, at pp. 3 and 4) who state that the portions of the materials in question that they have reviewed appear fully confirmatory of knowledge that they have previously had and to the extent new details are included these too fit within the framework of their previous understanding.

OPINIONS BELOW

A. Opinion of Judge Gesell.

Judge Gesell found that the study in question stretches back over a period well into the early 1940's and that it "includes material in the public domain and other material that was Top Secret when written long ago but not clearly shown to be such at the present time." And he determined that it was apparent from the "detailed affidavits" filed by the appellees that "officials make use of classified data on frequent occasions in dealing with the press and that this situatio is not unusual except as to the volume of papers involved."

He further found that "there is no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials" as a result of the publication of this study.

Judge Gesell also found that "publication of the documents in the large" may interfere with diplomatic negotiations "not so much because of anything in the documents, themselves, but rather resulting from the fact that it will appear to foreign governments that this Government is unable to prevent publication of actual Government communications when a leak such as the present one occurs." He then noted that "many of these governments have different systems than our own and can do this; and they censor."

In further considering what appears to be the thrust of the government claim of injury i.e. diplomatic relations, the Judge stated that "there has been some adverse reaction in certain foreign countries, the degree and significance of which cannot now be measured even by opinion testimony. No contemporary troop movements are involved, nor is there any compromising of our intelligence."

In considering the security classification of the subject documents, the Judge noted that there had been no effort "made by the Government to distinguish Top Secret and other material, to separate the two, or, indeed, to make any effort once the publication was completed, to determine the degree, the nature or extent of the sensitivity which still existed in 1968 or for that matter exists at the present time."

The Judge also noted in this regard the Government's statement that it was now "engaged in declassifying some of the material and requested time to complete this process with the thought that permission would then perhaps be given to The Post to publish what is ultimately declassified out of the whole." Considering the proof, he concluded that while the criteria of the Top Secret classification was clear "the Government has not presented, as it must on its burden, any showing that the documents at the present time and in the present context are Top Secret."

The Judge also pointed out that equity deals with "realities and not solely with abstract principles", and that the publications enjoined "concern an issue of paramount public importance, affecting many aspects of Government action and existing and future policy." And citing the need for an informed electorate, he stated that "the equities favor disclosure, not suppression. No one can measure the effects of even a momentary delay."

Finally, referring again to the Government's principal argument, the Judge found that there was no way in which it could adjust the First Amendment "to accommodate the desires of foreign governments dealing with our diplomats, nor does the First Amendment guarantee our diplomats that they can be protected against either responsible or irresponsible reporting."

Thus, Judge Gesell found that there was no showing of an immediate grave threat to the national security justifying a prior restraint on publication, and therefore, the Government having failed to meet its burden, "the First Amendment remains supreme." Accordingly, he denied a preliminary injunction.

B. Opinion of Judge Gurfein.

Insofar as here pertinent, Judge Gurfein, who heard the New York Times case, stated: * *

"This Court does not doubt the right of the Government to injunctive relief against a nowspaper that is about to public (sic) information or documents absolutely vital to current national security. But it does not find that to be the case here."

Referring to the *in camera* proceedings at which representatives of State, Defense and the Joint Chiefs of Staff testified, Judge Gurfein stated that this testimony "did not convince this Court that the publication of these historical documents would seriously breach the national security."

Judge Gurfein considered the consequences of a breach of security, pointing out:

"It is true, of course, that any breach of security will cause the jitters in the security agencies themselves and indeed in foreign governments who deal with us."

but determined that

"no cogent reasons were advanced as to why these documents, except in the general framework of embarrassment previously mentioned, would vitally affect the security of the nation. In the light of such a finding the inquiry must end."

Accordingly Judge Gurfein found there was no irreparable injury to the Government sufficient to justify injunctive relief.

In discussing the invasion of the constitutional rights here involved Judge Gurfein noted that prior restrain on publication is unconstitutional. Near v. Minnesota, 283 U.S. 697 (1931). Noting that the Free Press provision was not absolute, Judge Gurfein nonetheless held that:

"Fortunately upon the facts adduced in this case there is no sharp clash such as might have appeared between the vital security interest of the Nation and the compelling Constitutional doctrine against prior restraint."

Returning again to the Government's claim of embarrassment from publication the Court stated:

"If there be some embarrassment to the Government in security aspects as remote as the general embarrassment that flows from any security breach we must learn to live with it. The security of the Nation is not at the ramparts alone."

And in considering the Government's claims of danger to our security Judge Gurfein fittingly observed:

"Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be [s]uffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know."

In this fashion, Judge Gurfein considered the same arguments based on substantially the same evidence as did the Court here, and arrived at the same result.

ARGUMENT

I. The Findings Of The District Court Must Be Sustained Unless They Are Shown To Be Clearly Erroneous.

It is important at the outset to frame the procedural posture in which appellant finds itself on this appeal. It is hornbook law that in any case—even a case in which no constitutional principles are at stake—a plaintiff may not obtain the extraordinary remedy of a preliminary injunction unless it can establish to the satisfaction of the Court, not only that it will probably succeed at the final hearing, but also that absent preliminary injunctive relief, it will suffer grave and irreparable injury. See, e.g., Industrial Bank of Washington v. Tobriner, 405 F. 2d 1321 (D.C. Cir. 1968); Young v. Motion Picture Association of America, Inc., 299 F. 2d 119 (D.C. Cir. 1962), cert. den. 370 U.S. 922 (1962).

Appellant has failed to satisfy either of those requirements in the Court below— just as it previously failed to satisfy those requirements in the New York District Court.

At this point, therefore, even if this were a non-constitutional case, appellant on this appeal would be required to meet substantially more demanding tests than those imposed on it in the court below.

In order to obtain reversal in this Court of a denial of a preliminary injunction, appellant would be required to show that the District Court had clearly abused its discretion (Young v. Motion Picture Association of America, Inc., supra; Cox v. Democratic Central Committee of District of Columbia, 200 F. 2d 356 (D.C. Cir. 1952); Checker Motors Corp. v. Chrysler Corp., 405 F. 2d 319 (2d Cir. 1969), cert. den. 394 U.S 999 (1969); and that the findings of fact below were "clearly erroneous." Rule 52(a), F. R. Civ. P., 5 Moore's Federal Practice 52.07 at 2732. See e.g., Cox v. Democratic Central Committee of District of Columbia, supra; Craggett v. Board of Education of Cleveland City Sch. 2d 941 (6th Cir. 1964). See, Dist., 338 F. 2d 941 (6th Cir. 1964). See, also, Liberty Lobby, Inc. v. Pearson, 390 F. 2d 489 (D.C. Cir. 1968) (Burger, J); United States v. Brown, 331 F. 2d 362 (10th Cir. 1964).

But this is not an ordinary case. It constitutes a precedent-shattering attempt by the Government to impose a prior restraint which would prohibit appellees from publishing material of the highest political importance, about the most critical issue facing this nation today. Where such First Amendment rights are involved, appellant bears a burden even greater than is normally the case. For in such a case, the balance is always weighted in favor of free expression, and this is especially true where the proposed infringement involves a prior restraint, Liberty Lobby, Inc. v. Pearson, supra.

II. The Government Was Required To Show An Immediate Grave Threat To National Security.

In formulating the issue to be tried on remand, this Court imposed upon the Government the burden of proving that publication of the classified material "would so prejudice the defense interests of the United States or result in such irreparable injury to the United States as would justify restraining the publication thereof. . .See Near v. Minnesota, 283 U.S. 697, 715-16 (1931)" (Order dated June 19, 67). (Emphasis supplied). Clearly, a showing of some prejudice to the defense interests of the United States or some irreparable injury is insufficient. The prejudice must be so extraordinary and the irreparable injury so great as to justify this unprecedented infringement on First Amendment freedoms.

The majority opinion of this Court directing remand establishes beyond dispute the nature of the irreparable injury which the Government was required to show below. That opinion pointed out that, although Near v. Minnesota, supra, generally prohibited prior restraints on publication, there was a "narrow area, embracing prominently the national security, in which a prior restraint on publication might be appropriate" and that "the instant case may lie within that area" The majority of this Court further noted that, in its view, the law permitted the issuance of "an injunction against publication of material vitally affecting the national security. In this case, the Government makes precisely that claim—that publication by appellees will irreparably harm the national defense." (Emphasis supplied throughout)

Accordingly, this case was remanded to the District Court to permit it to develop a factual record sufficient to pass upon this issue. * * *

The Court below was under no misapprehension as to the issue before it on remand. It observed that it had been directed by this Court "to determine whether publication of material from this document would so prejudice the defense interests of the United States or result in such irreparable injury to the United States as would justify restraining the publication thereof." (Emphasis supplied)

The Near case itself, relied on by this Court, is enlightening as to the gravity of the injury required to be proved in order to justify a prior restraint on publication. That case speaks of "actual obstruction" to the Government's "recruiting service," the "publication of the sailing dates of transports," and "the number and location of troops." While we recognize, of course, that this list is not all-inclusive, it was intended to

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embrace only the most serious, immediate and substantial threats to the Government's ability to wage war, imminent risk of death to American military personnel, grave breaches of the national security, and the like.

Embarrassment to the United States because foreign Governments do not fully comprehend the operation of the principles governing our free institutions is not the kind of injury to the national defense which this Court, or any other Court, should recognize as a reason justifying the abrogation of those hard-won liberties of speech and press which are the envy of all whose freedoms are suppressed. Such embarrassment cannot justify the issuance of the unprecedented injunction here sought any more than embarrassment to prominent American statesmen and politicians could justify the penalties imposed under the historically and judicially discredited Alien and Sedition Acts. See New York Times Co. v. Sullivan, 376 U.S. 254, 276, et seq. (1964). The constitutional imperatives of an informed citizenry can tolerate no such infringement on our cherished freedoms.

III. The Government Has Failed to Establish Any Threat To National Security

We turn, now to the findings of the Court below, findings based upon a full evidentiary hearing, conducted primarily *in camera* so as to afford the Government the widest latitude to develop the evidence in support of its claims.

The District Court found that:

(1) The classified report embraced materials in the public domain, as well as materials that might have properly been classified top-secret long ago, but which were not shown to be so now;

(2) The Government had offered no proof that publication of those materials would lead to a definite break in diplomatic relations, an armed attack on the United States, an armed attack on an ally, a war, a compromise of military or defense plans, intelligence operations, or scientific and technological materials;

(3) The Government had failed to demonstrate that publication would result in any immediate, grave threat to the national security;

(4) The report itself contained no information concerning contemporary troop movements; and

(5) Publication of the materials would in no way whatsoever c o m p r o m i s e United States intelligence.

The District Court did find that publication of the documents "may" interfere with the ability of the State Department to conduct delicate negotiations but, significantly, such interference would result.

> ". . . not so much because of anything in the documents, themselves, but rather results from the fact that it will appear to foreign governments that this Government is unable to prevent publication of actual Government communications w h e n a leak such as the present one occurs. Many of these governments have different systems than our own and can do this; and they censor."

This is the only finding which even remotely bears on the Government's claim that the interests of the United States may somehow be compromised by the publication of these historical documents.

It may be that some foreign governments which, under different systems employing censorship as a way of life, may not fully comprehend why their repressive measures are here rejected, but this fact constitutes no valid reason for compromising those principles which have served freedom so long and so well. It is truly shocking that a Government dedicated to the preservation of free institutions should for the first time in its long history doggedly pursue its efforts at censorship merely because some foreign governments with systems alien to our own cannot understand why we do not emulate their censorial practices.

In any event, Judge Gesell effectively puts this contention in its proper constitutional perspective, stating (Pet. 27a):

> "In interpreting the First Amendment, there is no basis upon which the Court may adjust it to accomodate the desires of foreign governments dealing with our diplomats, nor does the First Amendment guarantee our diplomats that they can be protected against either responsible or irresponsible reporting."

IV. The Appellee Is Not Bound By The Government's Classification System

The Government's position below was based largely on the argument that it has the statutory power to classify documents and that, once such classification has been imposed, it may not successfully be challenged, in a declassification proceeding, unless it has been established that the Government's classification was arbitrary and capricious. The argument conveniently ignores the fact that this is not a declassification proceeding; this is not a case where a private party seeks access to classified documents in the exclusive custody or control of the Government. This is a case where, for the first time in the history of the Republic, our Government seeks, through prior restraint, to preclude publication of documents in the hands of those sought to be enjoined, and many other persons as well.

We are here concerned with a Constitutional case. The question is whether prohibition of publication of historical documents constitutes a violation of the First Amendment. The use of labels—even the label "Top Secret-Sensitive" by the Government—does not relieve the Courts of their duty independently to determine, on the basis of the record made below, whether the injunction the Government seeks would, if issued, impinge upon the defendants' First Amendment rights.

Under our constitutional system, the Courts are the ultimate guardians of these fundamental First Amendment rights. It is the Judiciary, not the Executive, which has the right—indeed the duty—independently to examine the evidence to determine whether an injunction would be fact abridge consitutional protections. Wood v. Georgia, 370 U.S. 375, 386 (1962); Craig v. Harney, 331 U.S. 367 (1947).

As was said in NAACP v. Button, 371 U.S 415, 429 (1963):

> " . . . a state cannot foreclose the exercise of constituional rights by mere labels."

In New York Times Co. v. Sullivan, 376 U.S. 254, the Supreme Court said (at 285):

> "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated. Speiser v. Randall, 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S Ct 1332. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see. . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' Pennakamp v. Florida, 328 US 331 335, 90 L ed 1295, 1297, 66 S Ct 1029; see also One, Inc., v. Olesen, 355 US 371, 2 L ed 2d 352, 78 S Ct. 364; Sunshine Book Co. v. Summerfield, 355 US 372, 2L ed 2d 352, 78 S Ct 365. We must 'make an independent examination of the whole record,' Edwards v. South Carolina, 372 US 229, 235, 9 L ed 2d 697, 702, 83 S Ct 680, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."

continued

V. 18 U.S.C. 793 (e) Is Not Applicable

Although the Government relies on Section 793(e) of U.S.C. Title 18 as the sole statutory support for its application for a preliminary injunction, it has conveniently ignored the fact that Congress, in amending the section in 1950, provided in Section 1(b) of the amendatory statue that:

> "Nothing in this Act shall be construed to **authorize, require, or establish** military or **civilian censorship or in any way to limit or infringe upon freedom of the press or speech as guaranteed by the Constitution of the United States** . . ." (P.L. 831, 81st. Cong., 2d Sess. Sept. 23, 1950, c. 1024, Tit. I).

We note also that Judge Gurfein, in the New York Times case, has expressly held, for many reasons there set forth, that the statute invoked by the Government does not even apply to publications by newspapers.

VI. The Granting of the Preliminary Injunction Will In Any Event Be Futile

It has already become obvious that, despite the continuation of this ill-conceived litigation, the Government's efforts to suppress the truth will ultimately prove futile. Copies of all or substantial portions of the Vietnam Report have already found their way into the hands of an undetermined number of persons outside the Government.

Benjamin Bradlee, the Post editor, has already been given portions of the materials from two other sources, two other completely distinct sources.

Yesterday afternoon, at or about the very time this Court was issuing its order continuing the restraint against appellees, Congressman Paul McCloskey announced on an NBC network television station that he intended to reveal the contents of unpublished portions of the report on Wednesday if the Department of Defense won't declassify them. Only this morning the Associated Press reported that the Boston Globe printed today what it said were hereto unpublished portions of a secret Pentagon study of the origins of the Vietnam war.

Thus, one thing is certain: Public revelation of the contents of this controversial report will continue apace, and all of it will soon become available to the American public. In such circumstances, no useful purpose could possibly be served by the injunction here sought, and the District Court's decision to deny injunctive relief should, without regard to the First Amendment principles to which we have adverted, therefore be affirmed. E.g., Humble Oil & Refining Company v. Harang, 262F. Supp. 39, 43-44 (E. D. La. 1966); Elliott v. Amalgamated Meat Cutters, Etc., 91 F. Supp. 690, 698 (W.D. Mo. 1950).

CONCLUSION

Based upon clear and unambiguous findings of the Court below, and for each of the reasons assigned, the order denying a preliminary injunction should be affirmed.

Respectfully submitted,
ROYALL, KOEGEL & WELLS

*Defendants' Exhibits are referred to as "Ds. Ex."

**The questions herein set forth are taken from the June 20, 1971 Sunday edition of the New York Times and are believed to be accurate.

***District Judge Gurfein in New York viewed the issue before him precisely as did a majority of this Court. He held that the issue was whether publication would result in "serious security breaches vitally affecting the interests of the nation" (Emphasis supplied).

I.
PRELIMINARY STATEMENT

This is an appeal by the United States from an order of United States District Judge Gerhard A. Gesell, entered June 21, 1971, denying the government's prayer for a preliminary injunction seeking to enjoin the Washington Post Company (The Post) and the individual defendants who are officers and employees of The Post, from the further dissemination, disclosure or divulgence of classified documents which the United States contends that The Post has in its possession in violation of law. A stay of this order was issued by this Court PER CURIAM on June 21, 1971. It is further ordered by this Court EN BANC that the parties file on original and nine copies of pleadings and supporting material in this appeal by 9:00 a.m. on Tuesday, June 22, 1971, and that the appellant file nine copies of the record on appeal, including all documents submitted by the parties in the District Court in support of their positions by the same time and date.

Prior to the issuance of the order by Judge Gesell on June 21, 1971, this Court had granted a temporary restraining order against publication by The Post and directed the United States District Court to hold a hearing and make a determination by 5:00 p.m. on the aforesaid date with regard to the United States' prayer for a preliminary injunction against further publication by The Washington Post of material contained in a 47-volume document entitled "The History of U.S. Decision-Making Process on Vietnam Policy," which bears an overall top secret classification.

II.
STATEMENT OF FACTS

At a time and place and in a manner unknown to the appellant the appellees without lawful authority obtained portions of a document, consisting of 47 volumes entitled "History of U.S. Decision-Making Process on Vietnam Policy," covering the period 1945-1967, prepared in 1967-1968 at the direction of then-Secretary of Defense Robert McNamara, as well as the internal documents from which said study was drawn. Said study and the internal documents were, at all times material herein, classified "Top Secret-Sensitive" pursuant to Executive Order 10501.

On June 18, 1971, the Washington Post published an article entitled "Documents Reveal U.S. Effort in '54 to Delay Viet Election" authored by appellant Roberts. This article was represented to be the initial article in a series. In the aforementioned article, appellee Roberts asserts that he is drawing upon "facts emerging from sections of the Pentagon study on the origins of the Vietnam war, made available to the Washington Post." The article quotes extensively from the aforementioned documents.

III.
THE PRELIMINARY INJUNCTION HAVE BEEN GRANTED

A. Presidential Authority With Respect to Foreign Relations and National Defense

In the second paragraph of its opinion, commencing at page 267 of the transcript, the Court notes:

> "The Court further finds that the publication of the documents in the large may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world. This is not so much because of anything in the documents, themselves, but rather results from the fact that it will appear to foreign governments that this government is unable to prevent publication of actual government communications when a leak such as the present one occurs. Many of these governments have different systems that our own and can do this; and they censor."

Implicit in this statement on the part of the court is the failure of the lower court to comprehend the nature of the power of the executive with respect to the conduct of foreign affairs. The Court's view of executive authority is contrary to the weight of authority and clearly erroneous.

In the case of United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Supreme Court explicitly stated that:

> ". . . we first consider the difference between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted."

The decision in Curtiss-Wright is but one in a series of cases where the courts have concluded that the responsibility for the conduct of foreign affairs, and the [illegible] in foreign affairs matters, are areas committed to the sole

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discretion of the executive which should not be subject to judicial review. See United States v. Belmont, 301 U.S. 324, 328 (1937); United States v. Pink, 315 U.S. 203, 229 (1942); Oetjen v. Central Leather Company, 246 U.S. 297, 302 (1918). But, it was in the Curtiss-Wright decision that the Supreme Court spelled out the considerations for leaving the conduct of foreign affairs in the sole discretion of the executive.

Not the least of these considerations was the fact that the process of negotiations between the United States and other sovereigns is necessarily a sensitive one, and often based on information available to the executive, which by its very nature cannot be and should not be made available to the public. In Curtiss-Wright, the Supreme Court noted this when it stated, at page 320:

> Moreover, he [the President] not Congress has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

The Court also noted that the other coordinate branch of Government had reached the very same conclusion:

> 'The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how and upon what subjects negotiations may be urged with the greatest prospect of success . . . The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.' United States Senate, Reports, Committee on Foreign Relations, Volume 8, page 24. U.S. v. Curtiss-Wright, supra, at 319.

This concern of the Supreme Court for the secrecy of information relating to the conduct of foreign affairs was expressed even more forcefully in the following passage from its later decision in Chicago & Southern Air Lines, Inc. v. Waterman Corporation, 333 U.S. 103 (1948):

> **The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs has available intelligence services whose reports are not and ought not to be published to the world.** It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit **in camera** in order to be taken into executive confidences. But even if courts could require full disclosure the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. (333 U.S. at 111) (Emphasis added).

It is against this background of consistent Supreme Court concern for the sensitivity of information relating to foreign affairs that the true implications of the District Court's ruling must be considered. For, in effect, the Court below has held that the Government does not possess a sufficient interest in preserving the confidentiality of sensitive negotiations with foreign governments to outweigh the interest of the appellees in publishing the contents of Top Secret documents they are not authorized to possess in the first instance. The District Court has either concluded that the disclosure of such negotiations would not constitute irreparable injury to this Nation's ability to conduct its foreign affairs or that, even if such irreparable injury were to occur, it was of no consequence in the face of appellees claim of First Amendment rights. The Government respectfully submits that either conclusion is clearly erroneous. Any fair analysis of the evidence taken at the hearing below adequately demonstrates the type of exceptional situation in which the Supreme Court in Near v. Minnesota, 283 U.S. 697, 715-716 (1931) contemplated an injunction should issue.

This executive power flowing from its Constitutional duties and responsibilities has been recognized by both the legislative and judicial branches. If doubt there could be, it is resolved by 200 years of history. George Washington, our first Presiden said:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers . . . (1 messages and papers of the President, page 194).

Thomas Jefferson, third President, and the most preeminent American defender of freedom of the press said:

> . . . all nations have found it necessary that, for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their Executive functionary only. He of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication. (Jefferson papers, Library of Congress, Vol. 168, fol. 29538).

The words of Washington and Jefferson have as much relevance and vitality in 1971 as they did when uttered.

B. The Court Applied The Wrong Legal Standard

The Court erred in holding that the First Amendment bars the government from obtaining an injunction against the publication by the Post of articles making public top secret and secret material that the Post has obtained without the authorization of the United States—the only agency that has authority to release such information for publication. The basic error of the District Court was that it applied the wrong legal standard.

The Court found (Transcript, p. 267) that "publication of the documents in the large may interfere with the ability of the Department of State in the conduct of delicate negotiations now in process or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world," and that the government had " demonstrated the many ways in which its efforts particularly in diplomacy will not only be embarrassed but compromised or perhaps thwarted" (Transcript, p. 269). The court held (Transcript, p. 271), however, that the government had not shown "an immediate grave threat to the national security" that "would justify prior restraint on publication," a conclusion apparently based on the fact that the government had presented "no proof that there will be a definite break in diplomatic relations, that there will be an armed attack on the United States, that there will be an armed attack on an ally, that there will be a war, that there will be a compromise of military or defense plans, a compromise of intelligence operations, or a compromise of scientific and technological materials," (Transcript, p. 269). This itemization of the kind of showing the court apparently would have deemed sufficient to justify an injunction purports to track the standards contained in Executive Order 10501 for classifying material as "top secret"; the court's conclusion presumably reflects its view (Transcript, p. 269) that "the Government has not presented as it must on its

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burden, any showing that the documents at the present time and in the present context are Top Secret" (Transcript, p. 269).

Even under the court's own theory, the government would not be required to show that publication would definitely have one of these consequences before it could justify a top secret classification for the material the Post now seeks to print. Executive Order 10501 merely requires, to warrant a top secret classification, that the material "could" result in exceptionally grave damage to the Nation "such as" the consequences to which the court referred.

The foregoing assumes, arguendo, that the lwoer Court was correct in holding that the United States was required to satisfy a Top Secret classification. This assumption is likewise erroneous. The government does not have the burden of supporting a Top Secret classification. Its burden is that of supporting a classification warranting the withholding of any information the classification requirements of Executive Order 10501..

More basically, however, we submit that the government is not required to make such a showing in order to justify an injunction against unauthorized publication of top secret and secret material that, according to the expert judgment of high government officials who testified at the hearing, would interfere with the conduct of our foreign relations and impair our national defense posture, particularly in Southeast Asia. The conclusions of these witnesses are set forth in sworn affidavits. (Government Exhibits 5, 6, 7 and 8).

The function of classifying material that significantly affects the nation's foreign relations and defense is as we have said a matter committed to the Executive and not the Judicial branch of the government. The reason is clear—the particular classification that material requires for national defense purposes and whether and when that classification should be changed are matters of the highest sensitivity and difficulty, and reflect judgments based on wide knowledge of and familiarity with many interrelated and subtle factors. The couurts simply are not equipped to make their own independent judgfents on these questions on the basis of what must necessarily be a rather cursory review of the material, viewed in isolation and without the background necessary fully to appreciate the implications of unauthorized publication.

In a case like this, therefore, the proper judicial inquiry is not, as the District Court apparently believed, whether the government presented "proof" that the classification was proper, but whether the government was shown to have acted arbitrarily and capriciously in concluding that the classification was required "in the interests of national defense" (Executive Order 10501). In the present case there can be no question that the material dealt with vital matters of foreign relations and defense, and high government officials believed that its disclosure would seriously prejudice those interests. Whether one agrees or disagrees with their judgment, it provides a sufficient basis for preventing the Post from breaching the security of the documents. Indeed, the District Court itself recognized the vital importance of the material to the foreign relations of the United States, since, as noted, it found that publication of the material "may interfere with the ability of the Department of State in the conduct of delicate negotiations ow in process or contemplated for the future" and that "its efforts particularly in diplomacy will not only be embarassed but compromised or perhaps thwarted" (Transcript, pp. 267, 269).

The decision of this case requires the Court to balance two competing interests of great public importance. On the one hand, there is the interest of the United States in insuring that national defense and foreign relations not be jeopardized or compromised by the unauthorized disclosure of sensitive material whose publication would be inimical to those interests and whose protection the classification system is designed to protect. On the other hand, there is the interest of the Post in making available to the public information that the newspaper believes it should receive. The information, however, is not in the public domain, or the result of the newspa[illegible] efforts, but is contained in classified documents which the Post has no right to possess and which it holds without authorization from the only agency — the Government — that may make them public.

The character of this material and the serious injury it could cause to our foreign relations and defense posture if made public provides ample basis for the Government's conclusion that it required the highest security classification.

C. The Court's Failure to Require Production of Documents Was Clearly Erroneous

In the very first sentence of its ruling, the Court stated that "The Washington Post has certain papers fom the History of the U.S. Decision-Making Process on Vietnam Policy which was given a 'Top Secret' security classification." Yet, in the third paragraph of that ruling, the Court stated:

> "The role of quasi-censor thus imposed is not one that any District Judge will welcome to have placed on him by an appellate decision. It has been a doubly difficult role because the material to be censored is unavailable for there is absolutely no indication of what the Post actually will print and no standards have been enunciated by the Court of Appeals to be applied in a situation such as this, which is one of first impression. (Emphasis added.)

If, as the Court below indicated, it was unable to properly rule in this case for the underscored reason. the disability was one of its own doing. In the Complaint filed herein, the appellant prayed for an order that "said defendants deliver to this Court all of the documents and materials referred to in paragraph 2 of the prayer herein to be held by this Court *in camera* pending a final order of this Court." On one occasion the Court itself urged the appellees to disclose to the Court the documents in question. This suggestion was refused by the appellees and the Court acceded in this refusal.

During the course of the trial herein, the appellant renewed its request that the appellees submit the material (which the Court com- [illegible] available to it) to the Court *in camera* to be inspected by the Court alone. The Court refused all such requests.

The only predicate for the Court's decision to refuse to require production of the documents for *in camera* ex amination by it was the First Amendment right asserted by the appellees. The appellant submits that the Court's decision in this regard is clearly erroneous. By its rulings the court has held that the appellees' First Amendment rights are so sacrosanct as to preclude an in camera inspection, by the Court alone, of stolen top secret documents belonging to the Unitd States. The holding is even more remarkable where, as here, the purpose of the requested inspection was limited to the question of whether or not the publication of the documents would seriously endanger the conduct of this nation's foreign affairs and national security.

D. The Lower Court's Own Findings Mandated A Preliminary Restraint

As it was required to do, the District Court expressly acknowledged (p. 267) that the publication of the documents in question might well occasion a serious public injury: i.e., it might "interfere with the ability of the Department of State in the conduct of delicate negotiations now in process or contemplated for the future, whether these negotiations involve Southeast Asia or other areas of the world." In view of this acknowledgement, we submit, a preliminary restraint against such publication was clearly mandated unless either (1) it could be fairly concluded on the basis of the record before the Court that there was no reasonable possibility that the government would eventually succeed on the merits of its suit or (2). the appellee newspaper had made a clear and convincing showing that any further delay in the publictaion of the documents would occasion harm to it teanscending in significance the public injury which would result from publication.

We have shown elsewhere that, at the very least, there is a substantial question as to whether the First Amendment gives a newspaper an unqualified right to publish classified government papers which have come into its

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possession after having been stolen. And there can be [illegible] the slightest doubt that appellee entirely failed to establish that it would sustain any significant injury were the publication of the documents to be precluded pending the final adjudication of the merits of the suit—let alone an injury that would exceed in magnitude the public harm threatened by publication. In this connection, it is noteworthy that the District Court did not purport to find the existence of a possible injury to appellee—or indeed anyone else—from a delay in publication: the most that it was prepared to state, without elaboration, was that "[n]o one can measure the effects of even a momentary delay." It scarcely need be stressed that this passing observation hardly stands on the same footing as the Court's explicit concession that our government's ability to conduct delicate diplomatic negotiations might be jeopardized if—prior to the final adjudication of the controversy—publication took place.

It should be added that the Court's refusal to give effect to the manifest imbalance in the threatened harm to the respective parties cannot be justified by its observation (p. 268) that:

> **"There is no showing that in this instance there was any effort made by the Government to distinguish Top Secret and other material, to separate the two,** or, indeed, to make any effort once the publication was completed, to determine the degree, the nature or extent of the sensitivity which still existed in 1968 or for that matter exists at the present time." (Emphasis added).

It is not clear whether this observation was intended to be a tacit suggestion that the government is estopped from relying upon the irreparable harm to the public interest which will flow from publication of the documents. While we do not believe that in any circumstances the manner in which the documents were classified could have such effect, it is obvious that the Court misunderstood the requirements of Executive Order 10501.

Executive Order 10501 provides in pertinent part as follows:

> Sec. 3(c). Marking of Classifications.
>
> "A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one overall classification notwithstanding that the pages, paragraphs, sections, or components thereof bear different classifications."

The court's reference to the government's failure to separate top secret material from other material bearing the classifications secret, confidential, and unclassified refers to the fact that each volume of the 47 volumes in question which the Court assumed (Transcript, pp. 171-172) were in the appellees' possession, bore the classification top secret as required by Section 3(c).

But to have seperated the various pages from the volumes in question as the court suggests would have reduced the 47 volumes to the thousands of extraneous pages from which it was originally produced. All of the extraneous pages which were unclassified are and remain unclassified, and are in the public domain or freely available under the Freedom of Information Act to any citizen desiring them. The volumes obviously only have news value in their compiled state, and in their compiled state were required under Section 3(c) to be classified top secret. The problem to which the court alluded was occasioned by the theft of the volumes in their compiled state. Had the government anticipated or been given notice of the theft it would have been quite willing to separate the unclassified documents from the classified.

IV.
CONCLUSION

Due to the pressures of time involved in the preparation of this memorandum, the Government has addressed itself primarily to those points which, in our view, constitute grounds for the reversal of the District Court's decision. A more complete statement of the Government's position with respect to the questions of law presented by this appeal is contained in the Memorandum in Support of Plaintiff's Motion for a preliminary injunction, filed with the District Court, which [illegible] its entirety and incorporates herein by reference.

In sum, we submit that the District Court clearly abused its descretion in not preliminarily enjoining the publication of the documents pending the ultimate resolution—based upon a fully developed record—of the substantial and important constitutional issues presented by this case. In this regard, it is important to bear in mind that, putting the public injury that will result from publication of the documents to one side, there is a plain public interest in obtaining a definite resolution of those questions on a full record. Unless, however, a preliminary injunction issues, the action will become moot at this interlocutory stage. For this reason as well, the Court below should be directed to enter the injunction.

Respectfully submitted,
U.S. Department of Justice
Attorneys for Plaintiff